STATE OF MICHIGAN

COURT OF APPEALS

SEALED POWER TECHNOLOGIES LIMITED PARTNERSHIP,

Plaintiff-Appellee,

v

THE TORRINGTON COMPANY, a foreign corporation,

Defendant-Appellant.

UNPUBLISHED
July 17, 1998

No. 203048
Muskegon Circuit Court
LC No. 91-027404 CK

Before: Markey, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

This matter is again before this Court, following our earlier opinion which vacated a denial of summary disposition. *Sealed Power Technologies Limited Partnership v The Torrington Co*, unpublished opinion per curiam, issued March 22, 1996 (Docket No. 157851). Following the earlier remand, summary disposition was again denied (on other grounds). Accordingly, the original judgment, entered upon a jury verdict rendered in plaintiff's favor in the amount of $3,666,190, was reaffirmed. Defendant again appeals and we affirm.

The trial court summarized the facts of this case in its opinion on remand which again denied summary disposition:

> On June 10, 1987 Sealed Power submitted a request for a quotation for honed bore rollers to Torrington. . . . On August 17, 1987, Torrington submitted a quote for 1.7 million honed bore rollers at $.77 each and a delivery date 42 weeks after receipt of order. . . . Plaintiff rejected this offer due to price and period of delivery. Between August 17 and August 31 negotiations took place. Torrington stated that it could produce rollers sooner and more cheaply by using a tumbling process rather than a honing process. On August 31, Torrington submitted a second quotation for 1.7 million tumbled bore rollers at $.50 each and a delivery date 16 weeks after receipt of order.

Torrington included the same disclaimer of warranty and limitation of liability provisions on the reverse side of both quotations. The warranty provision reads as follows:

"WARRANTY: The Seller warrants that parts manufactured by it will be as specified and will be free from defects in materials and workmanship. The Seller's liability under this warranty shall be limited to the repair or replacement or the repayment of the purchase price, or the granting of a reasonable allowance (as Seller may elect) of any part which upon return to Seller is found to be defective at the time of shipment provided Buyer notifies the Seller of any such defect within ten (10) days of its discovery, but in no event later than ninety (90) days from the date of shipment of such part by the Seller.

"Repairs and replacements shall be made by the Seller F.O.B. point of shipment.

"THE SELLER MAKES NO OTHER WARRANTY OR REPRESENTATION OF ANY KIND WHATSOEVER, EXPRESSED OR IMPLIED EXCEPT THAT OF TITLE AND ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED."

The Limitation of Liability reads as follows:

"The remedies of the Buyer set forth herein are exclusive, and the total liability of the Seller with respect to this order whether based on contract, warranty, negligence, indemnity, strict liability or otherwise, shall not exceed the purchase price of the part upon which such liability is based.

"The Seller or its suppliers shall in no event be liable to the Buyer any successors in interest or any beneficiary of this order for any consequential, incidental, indirect, special or punitive damages arising out of this order or any breach thereof, or any defect in, or failure of, or malfunction of the parts hereunder, whether based upon loss of use, lost profits or revenue, interest, lost goodwill, work stoppage, impairment of other goods, loss by reason of shutdown or non-operation, increased expenses of operation or claims of customers of Buyer for service interruption whether or not such loss or damages is based on contract, warranty, negligence, indemnity, strict liability or otherwise."

Between August 25 and 27, 1987 Sealed Power visited two of Torrington's plants for quality control inspections. On August 31, 1987 Sealed Power issued a purchase order for 500 sample parts at $.75 each. The front of the order contained the following language:

"(3) Terms and conditions on the front and reverse hereof are part and parcel of this contract. **No other terms are acceptable unless agreed upon by both parties.** (emphasis added)."

On October 7, 1987, Sealed Power issued a second purchase order to Torrington. . . . Sealed Power accepted the price of $.50 per part as stated in the second quotation. . . . Sealed Power's second purchase order contained the same clause outlined in (3) above. Torrington subsequently produced and shipped rollers to Sealed Power between January and August of 1988. In order to achieve a long-term contract with mutually acceptable terms, Sealed Power mailed Torrington sample warranty and limitation of liability provisions on February 12, 1988. . . . On April 27, 1988 representatives from both parties met to discuss these sample provisions and other terms of a single document to represent the final agreement between the parties. Prospective warranty and limitation on liability provisions were discussed during these negotiations. However, no agreement was reached on these two issues. . . . Engine failure occurred in the fall of 1988 and Sealed Power initiated litigation. Torrington filed a Motion for Partial Summary Disposition seeking to enforce its limitation on liability clauses. This Court in its opinion dated February 26, 1992, denied the motion because of failure of essential purpose and unconscionability. The battle of the forms issue was not addressed. This Court's decision was remanded by the Court of Appeals for reconsideration because this Court's ruling on failure of essential purpose and unconscionability was premature. The Court of Appeals held that if this Court finds that the warranty and limitation of liability provisions supplied by Torrington in its quote were unconscionable or failed of their essential purpose or were not a part of the contract due to conflict and disagreement, then the jury verdict is affirmed. In the instant case, the Court finds that the clauses were not a part of the contract due to disagreement and conflict and consequently the jury verdict is affirmed. [Emphasis in original.]

At issue here is whether defendant's disclaimer of warranty and limitation of liability, contained in the offer, were part of the contract. We have, in essence, a "battle of the forms." In brief, defendant argues that the provision in plaintiff's purchase order that "No other terms are acceptable unless agreed upon by both parties" was not sufficient to negate the provision in defendant's offer which limited the warranties and limiting remedies to the purchase price of the product. The trial court disagreed, as do we.

The essence of defendant's argument is that, under § 2-207 of the Uniform Commercial Code, MCL 440.2207; MSA 19.2207, the disclaimer of warranties and limitation on liability became a part of the contract because plaintiff's acceptance did not specifically negate those provisions. That statute provides in pertinent part as follows:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon,

unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

We believe that defendant's position must fail for two reasons. First, defendant's view of what constitutes an objection to different or additional terms is unreasonably narrow. Defendant argues that for plaintiff to have avoided defendant's terms on warranties and remedies, plaintiff's purchase order must have specifically included provisions regarding warranties and remedies. In essence, defendant argues that plaintiff could not generally reject the additional or different terms.

In addressing this issue, the parties look to our decision in *Challenge Machinery Co v Mattison Machine Works*, 138 Mich App 15; 359 NW2d 232 (1984), as did the trial court. Defendant, however, argues that the trial court's reliance on *Challenge Machinery* was misplaced because that case stands for the proposition that, in order for there to be a rejection of terms, there must be conflicting terms. That is, defendant argues, for the acceptance to reject the offer's terms on warranties and remedies, it must contain conflicting provisions regarding warranties and remedies.

Unlike defendant, we do not read *Challenge Machinery* as standing for the proposition that there must be conflicting provisions. Rather, *Challenge Machinery* recognized that conflicting provisions merely establish that an objection exists to the other party's provision. Indeed, *Challenge Machinery*, *supra* at 26, noted that

> the reason for discarding the conflicting provisions is that it is assumed that each party object to the other's contrary clause. A different interpretation would lead to the anomalous result of requiring a party to abide by the terms of a contract to which he never agreed and indeed to which objection had been taken.

In short, we do not believe that *Challenge Machinery* created any special means by which a party must reject different or additional terms under § 2-207. Rather, the question is: did the parties agree to the different or additional terms, with § 2-207 merely providing an answer where the response is silence.

In the case at bar, the response was not silence. Plaintiff expressly informed defendant that it would not agree to any different or additional terms other than those contained in its purchase order. As the *Challenge Machinery* Court noted, *supra* at 26, while "parties to a contract may agree to limit

their warranties and damages upon breach, we do not find that the *parties* agreed to such action in the [present] case."

In sum, we conclude that plaintiff's provision in its purchase order rejecting any additional or different terms was sufficient to indicate a lack of agreement to defendant's terms. In that case, the provisions of the Uniform Commercial Code prevail. In other words, while parties may agree to different remedies under § 2-719, MCL 440.2719; MSA 19.2719, there was no agreement in the case at bar to do so.

Therefore, we reject defendant's argument for two reasons: first, plaintiff did object to defendant's warranty and remedies provisions and, second, defendant cannot establish that plaintiff agreed to any change in the warranties and remedies from that provided by the UCC.

Next, defendant argues that the trial court erred in looking to the conduct of the parties in negotiating a long-term contract after the purchase agreement was reached in this case. We disagree. In the case at bar, after plaintiff issued the purchase order for the parts at issue here, the parties entered into negotiations for a more long-term agreement. The trial court made reference in its opinion to the conduct of the parties as reflecting no agreement on the limitation of warranties and liabilities issue. We do not see anything improper in this. The trial court took note of the subsequent negotiations in rejecting a claim made by defendant: that the parties had agreed to the limitation provisions. The trial court merely reached a logical conclusion: if the parties had, in fact, agreed to limiting warranties and remedies, why then would that have been such a contentious issue in subsequent negotiations? The trial court did not use those negotiations to prove the intent of the parties in the original agreement, but merely to reject defendant's claim that an agreement had, in fact, been reached.

Finally, defendant argues that, in rejecting the warranty disclaimers and damages limitation, the trial court erroneously rewrote the parties' agreement. We disagree. The trial court did not rewrite the contract. Rather, it merely concluded that the parties had not agreed to modifying the provisions of the UCC and, therefore, the default provisions of the UCC applied. That is precisely what the UCC calls for: applying the provisions of the UCC unless otherwise agreed to. Defendant's argument fails because the parties did not, in fact, agree otherwise.

Affirmed. Plaintiff may tax costs.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Janet T. Neff